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No. 97-1117

In The

Supreme Court of the United States

October Term, 1997

PAUL G. SHULTZ,

Petitioner,

vs.

DEPARTMENT OF ARMY,
UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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CONFLICT WITH STATE LAW

Shultz v. Army, 96 F.3d 1222 (9th Cir. 1996) (*Shultz III*) held and the Department of the Army, United States of America (Army) argues that Paul G. Shultz's (Shultz) evidence does not meet the required burden of proof — showing a continuous route across the land. Respondents' Brief at 11-12. This proposition finds no support in Alaska law. The requisite burden of proof is a question of state law. *See Fisher v. Golden Valley Electric Association*, 658 P.2d 127, 130 (Alaska 1983) and *Shultz v. Army*, 10 F.3d 649, 655 (9th Cir. 1993) (*Shultz II*). The Army does not question that State law applies. In Alaska, proving public user between termini is the required burden of proof.

> The extent of *public use* necessary to establish acceptance of the RS 2477 grant depends upon the character of the land and the nature of the *use*. . . . Although "infrequent and sporadic" use is not sufficient to establish public acceptance of the grant, . . . *continuous use is not required*. . . . Nor does the route need to be significantly developed to qualify as a "highway" for RS 2477 purposes; even a rudimentary trail can qualify.
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> * * *
>
> In *Dillingham*, we held that a road running across private property from the city docks to the town was subject to an RS 2477 right-of-way because roughly the same route had been used in the 1920's and 30's, before the property was withdrawn from the public domain. . . . The observation, from *Hamerly*, that a public highway must be "either necessary or convenient for the accommodation of the public" was expressed as a requirement that the claimed right-of-way must have "definite termini." . . . However, we also held that "[i]f there is a public road on [the property], it may be used for any purpose consistent with public travel." [Emphasis added and citations omitted.]

Fitzgerald v. Puddicombe, 918 P.2d 1017, 1020 (Alaska 1996).

Fitzgerald considered and rejected "continuous use." Fitzgerald also considered and rejected any requirement that the exact location be proven or that the trail's location be fixed.

> In any event, it is not necessary, as the trial court appears to suggest in its findings, that the precise path of the trail be proven. It is enough for one claiming an RS 2477 right-of-way to show that there was a generally-followed route across the land in question. . . . [Citations omitted.]

Id. at 1021-1022.

Fitzgerald is the rule of law (burden of proof) which applies to this case. *Shultz II* correctly applied Alaska law. *See Shultz II*, at 655-656. *Shultz III* and the Army have misinterpreted and misapplied the burden required by Alaska law. If there ever were doubt concerning the required burden, it was answered by *Fitzgerald*.

The Army dwells on a discussion of the district court's findings. Such argument does not address the conflict between the Circuit and the Alaska Supreme Court. *Shultz II* demonstrates that the district court's error was the incorrect application of Alaska law, not its findings of fact. *Fitzgerald* approved *Shultz II*'s analysis and application of Alaska law. *Shultz III*, like the district court, adopted an incorrect burden of proof.

The district court required proof of a wagon road. Pet. App. 35a-48a, para. 33 and 39. The Army agrees that a wagon road is not required. Respondents' Brief at 11.[1] The Army argues that Shultz did not prove a continuous route. Respondents' Brief at 12-13. *Shultz III* requires a "continuous route." This term is not defined. This proposition is not supported by citation. *Dillingham* and *Fitzgerald* say otherwise. *Dillingham Commercial Co., Inc. v. City Of Dillingham*, 705 P.2d 410, 414 (Alaska 1985); and, *Fitzgerald*, at 1020-1022.

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1. The Army's present position is contrary to the position it argued in *Shultz II*. *Fitzgerald* leaves no room for argument on this point; proof of a wagon road is unnecessary. A rudimentary trail is sufficient. *Fitzgerald*, at 1020.

The Army references witness Robert Busby's testimony in support of its argument. Busby testified that the country was open and there was no reason to follow a precise trail. Respondents' Brief at 19, and Pet. App. 35a-48a, para. 46-47, 50-53. *Fitzgerald* rejects a single trail requirement.

> Although a single trail may not have predominated prior to entry, a fair reading of Sumner's testimony reveals that he generally followed the trails' established route in constructing his driveway: . . .
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> * * *
>
> . . . It is enough for one claiming an RS 2477 right-of-way to show that there was a generally-followed route across the land in question. *See Shultz,* 10 F.3d at 655.

918 P.2d at 120-1022.

The Army talks of "opportunistic travel" and the change in location of the existing road versus historical trails. *Fitzgerald,* as did *Shultz II,* makes very clear that homesteading is not "opportunistic travel" and that present deviation from the original trail location is irrelevant to proving an RS 2477. Busby's testimony that the area in dispute was "open country" establishes Shultz's point. If the country is open, users will take the most advantageous route, which may not be the same "continuous" route. The route may vary depending on the season, weather, and agreement with adjacent land owners. If the Army or homesteaders allowed a different or better route closer to the river, which provided the same access, then blockage of other trails is irrelevant. The Army's argument that the present day route must be exactly the same as the historical route is contrary to *Fitzgerald* and finds no support in any Alaska decision.

The Ninth Circuit and the Alaska Supreme Court are in conflict concerning the requisite burden of proof. Mixed (or at best confusing) messages will be sent to Federal and State trial courts if the conflict between *Shultz III* and *Fitzgerald* is not resolved. Only the United States Supreme Court has the jurisdiction to resolve this conflict. This is not an issue which is limited to this litigation.

The application of 43 U.S.C. § 932 is a reoccurring issue in the State of Alaska and the Western United States.

THE NINTH CIRCUIT'S DEPARTURE FROM ACCEPTED JUDICIAL STANDARDS

There is no reasoned explanation for *Shultz III*. The Army's petition for rehearing identified neither new evidence nor a change in the law. *Shultz III* gives no explanation for the summary conclusion that Shultz failed his burden of proof. This conclusion is unjustifiable given the detailed analysis of *Shultz II* and the Alaska Supreme Court's *Fitzgerald* decision. The circumstances surrounding *Shultz III* and its conclusion are simply bizarre. Even the Army is unable to identify any judicial precedent which followed a similar pattern.

JURISDICTION/STANDING

The Army's jurisdictional argument that Shultz's Petition for Rehearing before the Ninth Circuit Court of Appeals was untimely by one day, is irrelevant.[2] The court of appeals accepted Shultz's filing and granted Shultz's petition. Pet. App. 63a. The Army does not dispute that Shultz's petition for writ of certiorari was timely filed. Supreme Court Rule 13.1 states that the request for the writ is timely if filed within ninety (90) days "after entry of the judgment." The Ninth Circuit Court of Appeals judgment granting Shultz's petition for rehearing was entered October 8, 1997. Shultz's petition for writ of certiorari was filed on January 5, 1998, eighty nine (89) days following entry of judgment.

The Army's argument concerning Shultz's standing was rejected by the district court. The Army did not appeal this decision.

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2. Shultz sent his Petition for Rehearing by private courier, DHL Worldwide Express (DHL), on October 31, 1996, four (4) days prior to the filing deadline. App. A, DHL Airbill. Shultz is presently seeking confirmation from DHL that it delivered the document prior to November 4, 1996. If Shultz's petition was one (1) day late because of courier problems, the court of appeals certainly would have extended the deadline and accepted Shultz's petition. Fed. R. App. P. 26(b) and 40(a).

The issue is not before this court. Even if the issue were considered, Alaska law is clear; Shultz does have standing. *See Shultz II*, at 653.

The Army's final argument is that Shultz's claim is barred by the statute of limitations, 28 U.S.C. § 2904a(g). *Shultz III* did not decide this issue. *Shultz III*, at 1222. *Shultz II* rejected this argument. *Shultz II*, at 661-662. If the burden of proof outlined by *Fitzgerald* and *Shultz II* is followed, the statute of limitations issue is moot.

CONCLUSION

For the reasons set forth herein and in Shultz's petition, the writ of certiorari should be granted.

Respectfully submitted,

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